

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. 82-1988

BRUCE TOWER, Public Defender of
Douglas County, Oregon and
GARY BABCOCK, Public Defender
of the State of Oregon,

Petitioner,

vs.

BILLY IRL CLOVER,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD A. SLOTTEE
Northwestern Legal Clinic
1018 Board of Trade Bldg.
310 S.W. Fourth Avenue
Portland, OR 97204

TABLE OF AUTHORITIES

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STATUTORY PROVISIONS

42 U.S.C. §1983

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QUESTION PRESENTED

Whether public defenders who conspire with public officials to deprive an indigent client of his constitutional rights are subject to liability under 42 U.S.C. §1983.

REASONS FOR DENIAL OF WRIT

This case presents an important issue of Federal law, but it is an issue which the Ninth Circuit decided in accordance with guidelines established by prior Supreme Court decisions. Further explication of this issue is unnecessary.

The decision of the Ninth Circuit Court of Appeals is a natural extension of this Court's decisions in Ferri v. Ackerman, 444 U.S. 193 (1979) and Polk County v. Dodson, 454 U.S. 312 (1981). In Ferri this Court held that the nature of court-appointed counsel parallels that of privately retained counsel, and therefore federally granted immunity is inappropriate. In Polk County this Court held that public defenders do not act under color of law in performing their duties since their function is similar to that of a court appointed attorney, and are therefore not subject to liability under 42 U.S.C. §1983. Dennis v. Sparks, 449 U.S. 478 (1980), held that public defenders who conspire with public officials are subject to §1983. The Ninth Circuit correctly applied the reasoning of these decisions to this case in deciding that public defenders are not absolutely immune from liability under 42 U.S.C. §1983 when it is alleged that a client has been deprived of his constitutional rights pursuant to a conspiracy between his public defenders and public officials.

The conflict in the Circuit Courts of Appeal on this issue is, except for Black v. Bayer, 672 F2d 309 (3rd Cir. 1982), the result of decisions made prior to this Court's decision in Ferri and Polk County. The Fourth Circuit questioned their prior contrary decision of Minns v. Paul, 542 F2d 899 (4th Cir. 1976) in the more

recent decision of Hall v. Quillen, 631 F2d 1154 (4th Cir. 1980).

As a result of the Ferri decision the Fourth Circuit now recognizes that Minns v. Paul may no longer be valid. The Fourth Circuit appears ready to adopt the reasoning of the Ninth Circuit.

Robinson v. Bergstrom, 579 F2d 407 (7th Cir. 1978) and Housand v. Heiman, 594 F2d 293 (2d Cir. 1979), granted public defenders immunity contrary to the decision of the Ninth Circuit. However, these cases were decided prior to Polk County and Ferri.

Black v. Bayer, 672 F2d 309 (3rd Cir. 1982) was decided subsequent to Ferri and Polk County, and did not follow the Ninth Circuit on this issue. The Black Court held that absolute immunity should be granted to public defenders who were acting within the scope of their professional duties. The Court did not discuss the alleged existence of a conspiracy and did not recognize the possible existence of a conspiracy in their decision. Actions which amount to a conspiracy cannot be considered as actions within the scope of a public defender's professional duties. The decision of Black v. Bayer appears to focus on facts different from the facts of this case, and is therefore a decision based on other grounds.

Respondent recognizes the valuable role public defenders play in our court system. However, the solution to the potential problem of frivolous suits is not to deny legitimate claimants access to the courts by adopting a restrictive view of 42 U.S.C. §1983. The role of the Courts in hearing legitimate claimants and in holding counsel accountable for any misconduct should not be compromised by the desire to prevent frivolous lawsuits.

DISCUSSION

1. The Ninth Circuit Court of Appeals correctly applied the reasoning of Ferri v. Ackerman, 444 U.S. 193 (1979) to the present case.

In Ferri, respondents argued that unless immunity was granted

in the liability of appointed counsel. It was argued that competent attorneys would therefore be unwilling to represent indigent defendants, and court appointed attorneys would be deterred from exercising their unfettered discretion. Ferri, 444 U.S. at 200-204. This court rejected these arguments, and held that court-appointed counsel did not have absolute immunity from liability.

The Court reasoned that the primary office performed by appointed counsel parallels the office of privately retained counsel. The primary rationale for granting immunity to public officials does not apply to defense counsel sued for malpractice by his own client. Immunity is inappropriate because the principal responsibility of defense counsel is to serve the undivided interests of his client. Immunity is appropriate for public officials because they represent the broad public interest. Id at 203-4. The decision in Ferri should be extended to cover public defenders.

2. Public Defenders do not act in a quasi-judicial capacity as do prosecutors.

A public defender's duty is to advance the undivided interests of his client as personal counselor and advocate. Polk County v. Dodson, 454 U.S. 312 (1981). Immunity is granted to public officials who act in a judicial or quasi-judicial capacity. Immunity is inappropriate for public defenders because their function as counsel is neither judicial nor quasi-judicial.

"The public defender's role in representing the interests⁴ of a client is the antithesis of the function of judges and prosecutors, which is to represent broad public interests. Under this functional test, the public defender does not serve in a capacity comparable to judges and prosecutors and immunity is therefore inappropriate. Id at 453.

3. Actions amounting to an alleged conspiracy are not within the scope of the professional duties of public defenders.

The petitioner suggests that the reasoning of Black v. Baver, 672 F2d 309 (1982), is the most appropriate rule to follow for this case. The court in Black held that court appointed counsel acting within the scope of their professional duties are absolutely immune from civil liability under 42 U.S.C. §1983.

Respondent alleged that he was deprived of his constitutional rights pursuant to a conspiracy between his public defenders and public officials.

The court stated that as a matter of public policy, court appointed counsel should not have to bear the costs of defending themselves in subsequent suits brought by indigent clients.

Id at 316. The court found that color of state law did not attach to the functions of court appointed counsel. However, the alleged acts of conspiracy cannot be considered as functions of counsel within the scope of their professional duties.

4. Immunity for Public Defenders is contrary to common law and therefore should be statutorily and not judicially granted.

In Ferri v. Ackerman, 444 US 193 (1979) this Court held that if appointed counsel are deterred from representing indigent clients due to inadequate compensation or fear of unwarranted malpractice suits, the legislature rather than the courts, is a more appropriate forum in which to address these concerns. The threat of suit exists for all court appointed counsel who do not meet their professional responsibilities. Judges and prosecutors have absolute immunity from liability under 42 U.S.C. §1983, in part since both have a long tradition of common law immunity from civil suits. Pierson v. Ray, 386 U.S. 547, 553-4 (1967); Imbler v. Pachtman, 424 U.S. 409 (1976). There is no common law tradition of immunity for public defenders. The legislature is

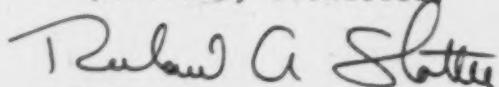
the proper forum to consider immunity for public defenders.

The need to prevent frivolous suits should not be met at the expense of those with legitimate grievances. By making public defenders immune from suit the Court would be in effect denying legitimate claimants access to the courts. It would also lessen the ability of an indigent client to hold counsel accountable for any misconduct. The desire to prevent spurious suits should be accomplished by enabling the court system to cope with these claims rather than by denying legitimate claims.

CONCLUSION

For the reasons set forth above, and for those in the opinion of the Ninth Circuit Court of Appeals, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



RICHARD A. SLOTEE
Northwestern Legal Clinic
1018 Board of Trade Bldg.
310 S.W. Fourth Avenue
Portland, OR 97204
Counsel for Respondent

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vs.

BILLY IRL GLOVER,

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Certificate of Service

I hereby certify that on this 27th day of July, 1983, a copy of the respondent's Motion and Affidavit for Leave to Proceed in forma pauperis, and Brief in opposition to Petition for Writ of Certiorari, were mailed, postage prepaid, to the following as counsel for petitioners:

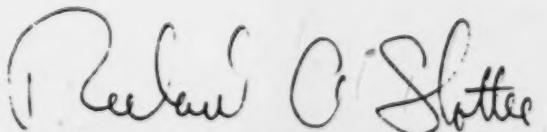
JAMES E. MOUNTAIN, JR.

Deputy Solicitor General

100 Justice Building

Salem, OR 97310

I further certify that all parties required to be served have been served.



RICHARD A. SLOTTEE
Counsel for Respondent
Northwestern Legal Clinic
1018 Board of Trade Bldg.
310 S.W. Fourth Avenue
Portland, Oregon 97204

APPEARANCE FORM
SUPREME COURT OF THE UNITED STATES

No. 82-1988

Bruce Tower and Gary Babcock
(Petitioner or Appellant)

vs.

Billy Irl Glover
(Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for Billy Irl Glover

(Please list names of all parties represented)

who IN THIS COURT is

- Petitioner(s) Respondent(s) Amicus Curiae
 Appellant(s) Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature X Richard A. Slottee

(Type or print) Name RICHARD A. SLOTTEE

Mr. Ms. Mrs. Miss

Firm Northwestern Legal Clinic

Address 310 S.W. Fourth Avenue, Suite 1018

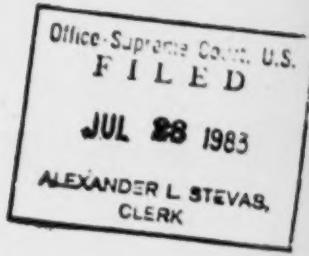
City & State Portland, Oregon Zip 97204

Phone (503) 222-6429

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURTS ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.



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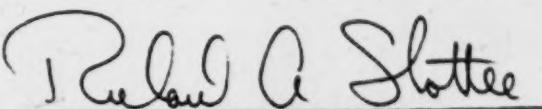
BILLY IRL GLOVER,

Respondent.

Motion For Leave to Proceed
In Forma Pauperis

Respondent BILLY IRL GLOVER, asks leave to file the attached brief in opposition to the Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The affidavit of the Respondent in support of the motion is attached hereto.


RICHARD A. SLOTTEE
Counsel for Respondent
Northwestern Legal Clinic
1018 Board of Trade Building
310 S.W. Fourth Avenue
Portland, Oregon 97204

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Respondent.

Affidavit in Support of Motion to
Proceed on Appeal in Forma Pauperis

STATE OF OREGON)
) ss.
County of Multnomah)

I, BILLY IRL GLOVER, being first duly sworn, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition are true.

1. I am presently employed. My gross salary is \$500 per month.

My place of employment is:

Family Metal Clad Buildings

Post Office Box 382

Creswell, Oregon 97426

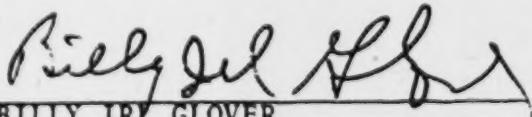
2. Within the past twelve months I have received no income from a business, profession, or from any other form of self-employment. During this period I have received no rent payments, interest, dividends or money from any other source. My sole source of income has been my employment listed in #1 above.
3. I own a checking account, the total value of which is approximately \$100.
4. I do not own any real estate, stocks, bonds, notes, automobiles, or any other valuable property.
5. I have two daughters who are dependent upon me for support.

They are:

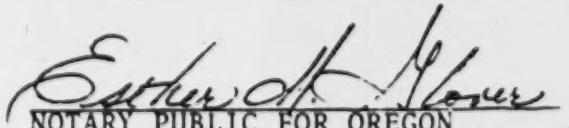
Ladena L. Glover - 10 years old

Cherlie J. Glover - 16 years old

6. Leave to proceed in Forma Pauperis was sought and granted in the United States Court of Appeals for the Ninth Circuit.
I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.


BILLY IRL GLOVER

SUBSCRIBED AND SWORN to before me this 21st day of JUNE, 1983.


NOTARY PUBLIC FOR OREGON
My Commission Expires: 1-10-85

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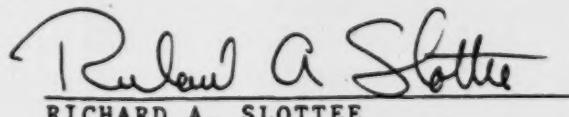
BILLY IRL GLOVER,

Respondent.

Affidavit of Mailing

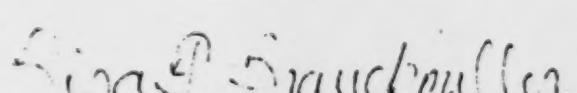
STATE OF OREGON)
) ss.
County of Multnomah)

I, RICHARD A. SLOTTEE, being first duly sworn, depose and say that I am a member of the Bar of the Supreme Court and the attorney for respondent in the above entitled case; that to the best of my knowledge the original and ten (10) copies of the Respondent's Motion and Affidavit for Leave to Proceed In Forma Pauperis, the Brief in opposition to Petition for Writ of Certiorari, the Appearance Form, and the Certificate of Service were mailed, first class, postage prepaid, to the Clerk of the Supreme Court of the United States on July 27, 1983.


RICHARD A. SLOTTEE
Counsel for Respondent

SUBSCRIBED AND SWORN to before me this 27 day of

July, 1983.


NOTARY PUBLIC FOR OREGON
My Commission Expires: 4-8-86